Supreme Court, U.S.
FILED

03-8825 AUG 14 2003

IN THE

SUPREME COURT of the UNITED STATES

RODRIGO DELGADO,
Petitioner,

v.

SILVIA GARCIA, WARDEN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RODRIGO DELGADO, Pro Se
K33356 B1-116
P.O. BOX 5002
CALIPATRIA, CA 92233

QUESTION PRESENTED

Whether the Ninth Circuit Court correctly held—in conflict with this Court's precedents—that the legal standard for determining competency to stand trial is not distinct from the insanity defense?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Rodrigo Delgado, was the defendant and appellant below.

Pursuant to S.Ct. Rule 29.6, petitioner states that he is in the custody of the California Department of Corrections pursuant to an invalid judgment and conviction in Los Angeles County Superior Court case number BA170189; Petitioner's detention is unlawful and improper, and in violation of the Constitution, the laws and treaties of the United States.

Respondent is Silvia Garcia, the Warden of Calipatria State Prison, Calipatria California 92233-5002.

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IN THE

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SILVIA GARCIA, WARDEN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Rodrigo Deldago (Petitioner), respectfully petition for a writ of certiorari to review the judgment of the Untied States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is unpublished and reprinted in the appendix hereto ("App.") at 1a. The order of the District Court adopting the Magistrate Judge's report and recommendation to dismiss is not reported and is reprinted at App. 2b. The Magistrate Judge's report and recommendation is not reported and is reprinted at App. 4c.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 2003. App. 1a. A timely petition for rehearing and rehearing en banc was denied on June 4, 2003. App.18d. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article VI, section 2 of the United States Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

INTRODUCTION

This case concerns the legal standard for determining competency to stand trial as distinct from the insanity defense. This Court has consistently held that, due process is violated if a competency hearing is not held when sufficient doubt arises regarding a defendant's competency. Drope v. Missouri, 420 U.S. 162,180 (1975).

The question presented in this case is whether the standard employed by the trial court sought to weigh the "sanity" of the Petitioner, rather than weigh his "competency" to stand trial.

STATEMENT OF THE CASE

Following a jury trial Petitioner was convicted of robbery. The California Court of Appeal affirmed and the California Supreme Court denied various habeas corpus filed by Petitioner. The claim presented (i.e., whether the trial court's failure to hold a formal hearing regarding Petitioner's competence violated his Fourteenth Amendment Due Process protection), erupted into a casade of erroneous transmissions of law resulting in forever effectively denying Petitioner the opportunity to further develop his claim.

For example, this claim survived Rule 4's scrunty under the habeas rules governing section 2254 petitions; and shows a real possibility that a real constitutional error has occurred. The state court provided no full and fair opportunity to litigate this claim. First, due process of law in each particular case means such an exercise of the powers of government as the settled maxims of law permit and sanction. To give such proceedings any validity, there must be a tribunal competent by its constitution.

Here, Petitioner has a substantial liberty interest in the challenged procedure employed by the state court's decision making process. Petitioner states below; with particularity the points of law or facts.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS THAT DISTINGUISHES THE LEGAL STANDARD FOR DETERMINING COMPETENCY TO STAND TRIAL FROM THE INSANITY DEFENSE.

Prior to trial, counsel for Petitioner requested a psychaiatric investigation and the preparation of a report regarding Petitioner's competency to stand trial. Counsel stated: "I'm led to the conclusion that there's a doubt as to Petitioner's competency to stand trial for various statements that Petitioner made to me, namely, that God is going to get him out of this and that no body is playing by God's rules in the court system. And also, he exhibited a sense of unprovoked euphoria like he's laughing and smiling for long periods of times when I've been trying to seriously deal with the issues in this case. We could be wrong. It could be whatever, which I don't know, but I can't prejudge it and for that reason I would like to request the confidential report, Your Honor." Rt10.

The court said "All right." Rt10. Then when the prosecution immediately submitted the matter, the court stated "then, pursuant to 1368 of the Penal Code, the Court will order that two psychiatrists be appointed to evaluate Petitioner." Rt10.

The minute order of the proceedings states that the Court declares doubt as to the defendant's mental competence. Rt9-11.

Approximately one month later, Petitioner retained new counsel. By that time, one of the court appointed psychiatrists had rendered a report, which stated that at this time, Petitioner is not demonstrating evidence of a "major mental disorder" which would render him mentally incompetent to stand trial. Rt 13.

Because the legal standard for determining competency to stand trial is distinct from the insanity defense. The Supreme Court of the United States layed down this bedrock principle in Drope v. Missouri, that due process is violated if a competency hearing is not held when sufficient doubt arises regarding a defendant's competency. 420 U.S. 162,180 (1975).

The Drope Court reminds the courts that this doubt relates not to the mental illness in general but to the practical aspects of the defense of the action: 1) whether Petitioner possessed the capacity to understand the nature and object of the proceedings against him; 2) whether petitioner possessed the ability to consult with his counsel; and 3) whether Petitioner possessed the ability to assist in preparing his defense. 420 U.S. 120,162,180(1975).

Here, Delgado's counsel addressed his concerns to the court regarding these very issues i.e., Delgado's ability or inability to actually understand the nature of the proceedings against him; the ability to consult with his counsel; and his ability to assist in preparing his defense. Even though the trial court declared doubt as to the [Petitioner's] mental competence [Ct128]; the Reporter's Transcript [Rt9-11] does not reflect any expression of doubt by the Court. Also, the court-appointed psychiatrists rendered a report based on an erroneous standard. Dr. Sharma's April 23, 1999 report indicated that "[P]etitioner at this time is not demonstrating evidence of a major mental disorder which would render him mentally incompetent to stand trial." Rt13.

Clearly, as the Drope case pointed out: "[t]his doubt relates not to mental illness in general but to the practical aspects of the defense of the action." See Kaplany v. Enomoto, 540 F2d 975 (9th Cir.1976). Because the standard employed by the trial court sought to weigh the "sanity" of the Petitioner, rather than weigh his competency to stand trial; such procedures denied him the due process of law to make further inquiry into his competency to stand trial.

II. THE QUESTION PRESENTED CONCERNS AN IMPORTANT AND RECURRING ISSUE OF THE STANDARD EMPLOYED TO WEIGH THE SANITY OF PETITIONER RATHER THAN WEIGH HIS COMPETENCE TO STAND TRIAL.

A. Petitioner Is Incompetent

All post-conviction Petitions have been attended under the "Next Friend" doctrine. Rule 17(c) of the Federal Rule of Civil Procedure explicity provides: (c) Whenever an infant or incompetent person has a representative, such as a general guardian, committee, or other like fiduciary, the repersentative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise presented in an action or shall make such other order as it deems proper for the protection of the incompetent person."

Here in this case, every court below has essentially granted the submission of every post-conviction document or petition submitted under Fed.R.Civ.P. 17(c), and inferentially concedes the incompetence of the Petitioner.

In Drope v. Missouri, supra, 420 U.S. 162, 43 LEd2d 103, 95 SCt 896, in an opinion by Burger, Ch. J., expressing the unanimous view of the court, it was held that (1) the defendant's due process right to a fair trial was violated by the trial court's failure to suspend the trial pending a psychiatric examination to determine the defendant's competence to stand trial; (2) in view of the court's failure to inquire into the defendant's mental competency there was no basis for determing whether defendant had effectively waived his right to be present at his trial; and (3) defendant's due process rights would not be adequately protected by merely remanding for a psychiatric examination aimed at establshing whether the defendant was in fact competent at the time of the trial.

Because the issue is not whether Petitioner was mentally insane, but whether he was competent to stand trail. The same attention given in the Drope case should be given to the facts disputed in this case as well. Whats more is the Ninth Circuit Court of Appeal, has allowed the prosecution of these matters to proceed under Fed.R.Civ.P. 17(c); which, as a prerequisite demands the Petitioner possess some type of language difficulties (see e.g., United States ex rel. Bryant v. Houston, 273 F at 916 (dicta)); or illiteracy or poor

education (see e.g., United States ex rel. Sero v. Preiser, 506 F2d at 1126); or physical or mental impairment (see e.g., Demostheness v. Baal, 495 U.S. 731 (1991); Whitmore v. Arkansas, 495 U.S. at 162 ("Most frequently, 'next friends' appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence to seek relief themselves.").

Wherefore, I respectfully ask the Court to consider whether the Court may properly be influenced in deciding whether to grant a petition for certiorari, vacate the judgment below, and remand the case (GVR) for further consideration.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Rodrigo Delgado

Rodrigo Delgado Petitioner

Jerry L. Armstrong Next Friend

Dated: August 31, 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 02-57064

RODIRGO DELGADO,
Petitioner,

v.

SILVIA GARCIA, WARDEN,
Respondent.

D.C. No. CV-02-03590-AHS

Filed: April 23, 2003

Before: HUG and RAWLINSON, Circuit Judges.

ORDER

Petitioner's request for certificate of appealability is denied. See 28 U.S.C. § 2253(c).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 02-3590-AHS(E)

RODRIGO DELGADO,
Petitioner,

v.

SILVIA GARCIA, WARDEN,
Respondent.

MEMORANDUM ORDER

The Court has reviewed the Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reaons set forth in the Magistrate Judge's Report and Recommendation, filed September 4, 2002, the Court finds that the Petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253; Fed.R.App.P. 22b; see also Slack v. McDaniel, 529 U.S. 473 (2000); Lozada v. Deeds, 498 U.S. 430 (1991); Gardner v. Pogue, 558 F2d 548,550 (9thCir. 1977).

IT IS ORDERED that the Certificate of Appealability is denied.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, by United States mail, on Petitioner and on counsel for Respondent.

DATED: _____ 2002.

_____
ALICEMARIE H. STOTLER
U.S. DISTRICT JUDGE

PRESENTTED this 24th day of November, 2002, by:

_____
CHARLES F. EICK
U.S. MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 02-3590-AHS(E)

RODRIGO DELDADO,
Petitioner,

v.

SILVIA GARCIA, WARDEN,
Respondent.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It recommended that the Court issue an Order: (1) approving and ad pting this Report and Recommendation; and (2) directing that Judgment be ordered denying and dismissing the Petition with prejudice.

II. REPORT

Prior to trial, counsel for Petitioner requested a psychiatric investigation and the rpeparation of a report regarding Petitioner's competence to stand trial.

Counsel stated:

> "I'm led to the conclusion that there's a doubt as to [Petitioner's] competency to stand trial for various statements that [Petitioner] made to me, namely that God is going to get him out of this and that nobody is playing by God's rules in the court system. And, also, he exhibited a sense of unprovoked euphoria like he's laughing and smiling for long times when I've been trying to seriously deal with the issues in this case. . . .We could be wrong. It could be a psychiatrist finds that it could be play acting or it could be whatever, which I don't know, but I can't prejudge it and for that reasons I would like to request the confidential report, Your Honor" Rt9.

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1 To the extent any of Petitioner's claims may be unexhausted, the Court may deny unexhausted claim on the merits. See 28 U.S.C. § 2254(d). The Court assumes, arguendo, Petitioner has not procedurally defaulted any of his claims. See Lambrix v. Singletary, 520 U.S. 518,523-25 (1997); Barrett v. Acevedo, 169 F3d 1155,1162 (8th Cir), cert. denied, 528 U.S. 846 (1999) ("judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated").

The court said "All right". Rt10. Then, when the prosecution immediately submitted the matter, the court stated "Then, pursuant to 1368 of the Penal Code, Court will order that two psychiatrists be appointed to evaluate [Petitioner." Rt 10. Although the minute order of the proceedings states "Court declares a doubt as to the defendant's mental competence. . .," the Reporter's Transcript does not reflect any expression of doubt by the court (Compare Clerk's Transcript 128 with Rt 9-11). California courts sometimes order proceedings under section 1368 without expressing any doubt about a defendant's competence. See e.g., People v. Johnson, 235 CalApp.3d 1157,1162, 1 Cal. Rptr.2d 252,255 (1991).

Approximately one month later. Petitioner retained new counsel. Rt12. By that time, one of the court-appointed psychiatrists had rendered a report, which the court evidently had read (See Dr. Sharm's April 23, 1999, report, included among confidential documents lodged under seal July 25, 2002; Rt13). This report states, inter alia., "[Petitioner] at this time is not demonstrating evidence of a major mental disorder which would render him mentally incompetent to stand trial. I believe he is able to understand the nature and purpose of the proceedings and

is able to rationally cooperate with counsel in presenting a defense. He is competent to stand trial. . . . The defendant has no past history of psychiatric or mental health contact" (Dr. Sharma's April 23, 1999 report).

The following exchange then occurred between the court and Petitioner's new counsel:

The Court: "I'm convinced that [Petitioner is not mentally deranged.

[Petitioner's New Counsel]: His competent obviously.

The Court: Yest." Rt13.

Thereafter, the court did not go forward with any formal hearing regarding Petitioner's competence, the matter proceeded to trial, and no one objected to the failure to hold such a hearing. [2]

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2 On the same day the above-quoted exchange occurred between the court and Petitioner's new counsel, the second psychiatrist rendered his report. This report also concluded Petitioner "is clearly competnet to stand trial" (Dr. Markman's May 3, 1999 report, included among confidential documents lodged under seal July 25, 2003).

Petitioner argues that the trial court's failure to hold a formal hearing regarding Petitioner's competence merits habeas relief. This argument should be rejected.

"In conducting habeas review, a federal court is limited to deciding whether a convicted violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62,68 (1991). Habeas relief is not available for an alleged error in the interpretation or application of state law. Id. at 67-68; Dubria v. Smith, 224 F3d 995, 1001 (9thCir. 2000) (en banc), cert. denied, 531 U.S. 1148 (2001). Thus, the issue before this Court is not whether section 1368 of the California Penal Code reqquired a competency hearing, but, rather, whether constitutional due process required such a hearing. Id.; see also Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982) ("A mere error of state law is not a denial of due process. If the contrary were true, then every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional questions").

Constitutional due process requires that a state trial court hold a competency hearing "if a reasonable judge would be expected to have a bona fide

doubt as to the defendant's competence." Amaya-Ruiz v. Stewart, 121 F3d 486,489 (9thCir.1997), cert. denied, 522 U.S. 1130 (1998) (citations and quotations omitted); Miles v. Stainer, 108 F3d 1109,1112 (9thCir.1997) ("Due process requires a trial court to hold a competency hearing sua sponte whenever the evidence before it raises a reasonable doubt whether a defendant is mentally competenct.") "Although no particular facts signal incompetence, suggestive evidence includes a defendant's demanor before the trial court, previous irrational behavior, and available medical evaluations." Amaya-Ruiz v. Stewart, 121 F3d at 489 (internal quatations omitted); see Miles v. Stainer, 108 F3d at 1112. In determining whether a trial court should have convened a competency hearing, the reviewing court must confine itself to the contemporaneous record before the trial court. Amaya-Ruiz v. Stewart, 121 F3d at 489; United States v. Lewis, 991 F2d 524,527 (9thCir.), cert. denied, 510 U.S. 878 (1993); DeKaplany v. Enomoto, 540 F2d 975,982-83 (9thCir. 1976), cert. denied, 429 U.S. 1075 (1977) ("DeKaplany").

There existed scant evidence of incompetence before the trial court at the time the court ordered psychiatric evaluations of Petitioner. There was no

record of any psychiatric history, treatment or problems. Petitioenr apparently had not exhibited any aberrant behavior while in court. Petitioner's former counsel merely reported Petitioner's statements regarding trust in God and what the attorney believed was inappropriately euphoric behavior. As a matter of law, a reasonable judge would not be expected to have a "bona fide doubt" as to Petitioner's competence based upon the circumstances then existing.

Courts have held that much more persuasive evidence of incompetence than that existing here falls short of establishing constitutional error for failure to conduct a competency hearing. In DeKaplany, the defendant made two irrational outbursts at trial, one of which required forcible restraint. DeKaplany v. Enomoto, 540 F2d 975,978 (9thCir. 1976), cert. denied, 429 U.S. 1075 (1977). One psychiatrist stated the defendant in Dekaplany suffered from paranoid schizophrenia and "was not able rationally, logically and consciously to govern his actions," while another psychiatrist opined that the defendant suffered from multiple personality syndrome. Id. at 979. Further, the defendant in DeKplany attempted suicide while awaiting trial. Id. at 988 In Bassett v. McCarthy, 549 F2d 616,617,619 (9thCir.), cert. denied,

434 U.S. 849 (1977), the defendant had been mentally ill from childhood, once had been adjudged incompetent, and had committed a "bizarre" crime. Most experts believed the defendant in Bassett suffered from paranoid schizophrenia, accompanied by delusions and hallucinations. Id. at 619. This defendant refused to talk to his attorney on numerous occasions, and one psychiatrist opined that he was "too fragile" to be subjected to trial examination. Id. at 621. In Hernandez v. Ylst, 930 F2d 714,715-16 (9thCir.1991), the defendant made delusional statements to support a motion for jail transfer, including allegations of forciable drug injections by jail personnel and sexual assults by other prisoners. In each of these cases, the reviewing court found no error in the trial court's failure to conduct a competency hearing. see also Adams v. Wainwright, 764 F2d 1356,1361 (11thCir. 1985), cert. denied, 474 U.S. 1073 (1986) (although petitioner could not even recall the details of having committed the murder, the court found no "real, substantial, and legitimate doubt as to his competency" that would require the trial court to hold an competency hearing); United States v. Veatch, 674 F2d 1217, 1222-23 (9thCir.1981), cert. denied, 456 U.S. 946 (1982) (although one day before trial, an examining psychiatrist concluded that defendant was incompetent,

defendant had long history of mental problems, and defendant had been found incompetent to stand trial at least once before, the court found no error due to failure to hold a competency hearing).

Furthermore, even if a reasonable judge would have had a bona fide doubt regarding Petitioner's competence when the psychiatric evaluations were ordered, any such doubt evaporated soon thereafter. A psychiatrist evaluated Petitioner and reported Petitioner was competent. Petitioner's new counsel confirmed Petitioner was "competent obviously," perhaps implicityly withdrawing any request for further proceedings regarding Petitioner's competence. As previously discussed, the "bona fide doubt" analysis turns upon the information available to the court at any given time. Even if a bona fide doubt existed at one time, subsequent events, including doctors' reports, may dispel any such doubt. Cf. Amaya-Ruiz v. Stewart, 121 F3d 486 (9thCir.1997), cert. denied, 552 U.S. 1130 (1998) (despite counsel's continuing belief in defendant's incompetence, and despite continuing aberrant behavior, there no longer existed any bona fide doubt requiring further inquiry into competence once ocurt held a competency hearing and found the defendant

competent on the basis of medical evaluations); People v. Johnson, 235 CalApp. 3d 1157, 1 CalRptr2d 252 (1991) (no error where court initially ordered competency evaluation but later granted defense counsel's motion to waive competency hearing after court received medical report attesting todefendant's competence); see also Walker v. Gibson, 228 F3d 1217, 1228-29 n.3 (10thCir.2000), cert. denied, 533 U.S. 933 (2000) (non-existence of bona fide doubt regarding competence reders harmless any procedural defects in the competency hearing procedure).

II. Petitioner Has Failed To Demonstrate Ineffective Assistance of Appellate Counsel.

Petitioner argues appellate counsel's filing of a "Wende" brief deprived Petitioner of the effective assistance of counsel. This argument should be rejected.

To establish ineffective assistance of counsel, Petitioner must prove: (1) "counsel's representation fell below an objective standard of reasonableness"; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been dirrerent. Strickland v. Washington, 466 U.S. 668,688,694,697 (1984) ("Strickland").

The Court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Strickland, 466 U.S. at 697; Thomas v. Borg, 159 F3d 1147,1151 (9thCir.1998), cert. denied, 526 U.S. 1055 (1999) ("We need not evaluate both prongs of the Strickland test if the defendant fails to establish one").

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. United States v. Quintero-Barraza, 78 F3d 1344,1348 (9thCir.1994), cert. denied, 519 U.S. 848 (1996); see Strickland, 466 U.S. at 689-90. The Court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. Under Strickland, the test is "only whether some reasonable lawyer at the tiral could have have acted, in the circumstances, as counsel acted." Coleman v. Calderon, 150 F3d 1105,1113 (9thCir.), rev'd on other grounds, 525 U.S. 141 (1998) (citations and internal quotations omitted); see also White v. Singletary, 972 F2d 1218,1220 (11thCir. 1992), cert. denied, 514 U.S. 1131 (1995);

United States v. Nguyen, 997 F. Supp. 1281 (C.D.Cal.1998).

The Court may "neither second-guess counsel's decision, nor apply the fabled twenty-twenty vicsionof hindsight." Campbell v. Wood, 18 F3d 662,673 (9th Cir.), cert. denied, 511 U.S. 1119 (1994). "In short, the defendant must surmount the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." United States v. Quintero-Barraza, 78 F3d at 1348 (citation and internal quotations omitted).

The above standards apply to a claim that appellate counsel ineffectively failed to raise a meritorious issue on appeal. Smith v. Robbins, 528 U.S. 259 285-86 (2000) (claim that counsel ineffectively filed a "Wende" brief governed by Strickland); see also Alford v. Rolfs, 867 F2d 1216,1220 (9thCir.1989) (claim of ineffective assistance of appellate counsel governed by Strickland).

Contrary to Petitioner's apparent argument, California's "Wende" procedure does nto violate an appellant's constitutional right to the effective assistance of counsel. Smith v. Robbins, 528 U.S. 259,285-86 (2000). Moreover, in appellate

counsel's reasonable view, the risks of pursuing any of the theoretically available issues on appeal outweighed any conceivable benefit in pursuing any of those issues. See Petition at 60. Consequently, Petitioner has failed to show he received ineffective assistance of appellate counsel within the meaning of Strickland. See Morris v. California, 966 F2d 448,456-57 (9th Cir.), cert. denied, 506 U.S. 831 (1992) (if the Court can conceive of a reasonable explanation for counsel's action or inaction, the Court need not determine the actual explanation). Petitioner also has failed to prove a reasonable probability of a different outcome on appeal had counsel raised those issues Petitioner now claims counsel should have raised.

CONCLUSION

For all of the foregoing reasons,[3] IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: September 4, 2000.

CHARLES F. EICK
U.S. MAGISTRATE JUDGE

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3 As the foregoing discussion demonstrates, the Petition should be denied because Petitioner has failed to demonstrate he is "in custody in violation of the Constitution or laws or treaties of the Untied States," within the meaning of section 2254(a) of Title 28, United States Code. Consequently, the Petition necessarily also should be denied because the Petition failed to satisfy the requirements of section 2254(d) of Title 28, United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996."

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 02-57064

RODRIGO DELGADO,
Petitioner,

v.

SILVIA GARCIA, WARDEN,
Respondent.

D.C.No.CV-02-03590-AHS

Filed: June 4, 2003

Before: HUG and W. FLETCHER, Circuit Judges.

The clerk is directed to file appellant's "Petition for Rehearing and Suggestion for Rehearing En Banc," received on May 12, 2003.

Appellant's "Petition for Rehearing and Suggestion for Rehearing En Banc" is construed as a motion for reconsideration of this Court's denial of appellant's request for a Certificate of Appealability. So Construed, the motion for reconsideration is DENIED. No motion for recondideration rehearing, clarification, stay of mandate, or any other submissions shall be filed in this closed docket.